Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

77-224

JAMES E. ZIMMERMAN,
ELNORA M. ZIMMERMAN,
Petitioners,

v.

DAIL EBER,
NICK STIPA,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JAMES E. ZIMMERMAN
1616 North Sunset Drive
Tempe, Arizona 85281
(602) 994-5183

In Proper Person

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PETITION FOR WRIT OF CERTIORARI

This Petition for Certiorari is to review the opinion delivered in this matter on April 25, 1977, by the United States Court of Appeals in and for the 10th Circuit. This Petition is submitted pursuant to Rule 19 et seq.

Supreme Court Rules to correct overlooked or misapprehended points of law and fact contained in the 10th Circuit Court of Appelas opinion filed April 25, 1977. A Petition for rehearing for Appellants was filed within the time provided by law and denied on May 20, 1977.

The question presented for review is whether the 10th Circuit Court's holding that the trial court supplemental instruction with regard to the Kansas fresh pursuit statute K.S.A. 22-2404, Section 3, is a correct statement of the law and a proper instruction, is in direct conflict with applicable state law. Petitioners intend that the holding is in direct conflict with the applicable statutory and case law of the state of Kansas.

The portion of the Kansas fresh pursuit statute with which we are concerned here, was adopted almost verbatim from the Uniform Interstate Fresh Pursuit act on March 29, 1937. That statute, and the applicable portion, provide as follows:

> "K.S.A. 22-2404 (3) If an arrest is made in this state by a law enforcement officer of another state in accordance with the provisions of this section he shall without unnecessary delay take the person arrested before a magistrate of the county in which the arrest was made. Such magistrate shall conduct a hearing for the purpose of determining the lawfullness of the arrest. If the magistrate determines that the arrest was lawful he shall commit the person arrested to await a reasonable time the issuance of an extradition warrant by the government of this state, ot the waiver thereof, or shall permit such person to go at large upon giving an appearance bond, with or without surety. If the magistrate determines that the arrest was unlawful he shall order the discharge of the person arrested."

This case began on September 20, 1973, in the early morning hours when your Petitioner and his wife were returning to their home in Kansas from an evening spent in Independence, Missouri. Shortly after crossing into Kansas from Missouri, Petitioner and his wife were stopped by officer Eber and officer Stipa, of the Kansas City, Missouri, Police Department. The officers stated that they observed Petitioner's automobile speeding on a Missouri highway and pursued Petitioners into the state of Kansas wherein Petitioners were arrested for violation of Missouri state law. Subsequent to the arrest for the Missouri violations and altercations ensued between the officers and Petitioners resulting in Kansas charges also being filed against Petitioners. During the trial of this matter the officers testified that the initial arrest was made as a result of fresh pursuit for the violations which occurred in Missouri. In his jury instructions the trial court mentioned and explains K.S.A. 22-2404, Section 3. During its deliberation the jury inquired to the court as to whose responsibility it was to bring Petitioners before a magistrate. The trial court issued a supplement instruction which provided in part as follows:

> "The responsibility of taking them before a magistrate, if any existed under the circumstances of this case, as a matter of law, in my opinion, rested with the Kansas City Police Department and not the Defendants."

It is the above supplemental instruction which the Court of Appeals held was proper. It is Petitioner's contention that this is an improper statement of the law of the state of Kansas and that the 10th Circuit Court's finding that it was a proper instruction is in direct conflict with Kansas law. With respect to the Kansas charges filed against Petitioners, both of your Petitioners were convicted in the Kansas City, Kansas Municipal Court. On appeal the convictions were reversed because of the failure of the officers to bring Petitioners before a magistrate as required by Kansas law. An authenticated copy of the order dismissing the charges against Petitioners was admitted into evidence at the trial of this matter. The import of that order was that the Kansas City, Missouri police officers who testified that their initial arrest for Missouri law, had the responsibility to take Petitioners before a magistrate pursuant to the Kansas statute. This they failed to do. The trial court's instructions should have propounded only the elements relevant to the definition of an arrest as a matter of law therefor, allowing the jury to determine whether the Missouri police officers had in fact conducted themselves in such a manner as to require that they bring Petitioners before a magistrate. This is especially true, as there was testimony by the Police officers in evidence that they were in pursuit of Petitioners to apprehend them for committing the alleged crimes of speeding and operating a vehicle under the influence of alcohol in the state of Missouri. Thus, the mandate of K.S.A. 22-2404 to take the arrested person before a magistrate was applicable and the proper supplemental instruction in response to the jury's inquiry was that it was the responsibility of the Missouri police officers to take Petitioners before a magistrate.

The Court of Appeals states that the record supports the finding that Petitioners were arrested by the Missouri police prior to the arrival of the Kansas police. It is this finding which Petitioners asserted gave raise to their cause of action for false arrest based upon the failure of the Missouri police to take Petitioners before a magistrate as required by the Kansas fresh pursuit statute. After finding that the arrest occurred when Petitioners were initially stopped, the Court's opinion goes into a discussion of arrest by a private person under K.S.A. 22-2403 and *State v. Shienle*, 218 Kan. 637, 545 P.2d 1129 (1976). The Court of Appeals, at page five of its opinion, states three facts which are not in accord with the facts contained in the record.

The Court states that the Missouri police officers observed Petitioners speeding in both Missouri and Kansas. To the contrary, the testimony of officer Stipa was that nothing had happened in Kansas for which he could have made an arrest when Petitioner's car was first stopped. While officer Eber testified that the arrests were based upon what he observed happened in Missouri. Nowhere in the record is there any testimony that Plaintiffs were speeding in Kansas. The Court of Appeals continues stating that Petitioners were charged with Kansas, not Missouri, violations of the law which occurred after Petitioner's car was stopped in Kansas. This clearly ignores the testimony that Missouri charges were filed in addition to the Kansas charges. Finally, the Appeals court states that Petitioners brought fresh pursuit into the case. Petitioners did use fresh pursuit as a theory for recovery but, the police officers sought through out the case to use fresh pursuit to justify their actions. The Trial Court instructed that the police officers claimed they acted in fresh pursuit and

went on to define fresh pursuit for the jury. On appeal, the Missouri police officers changed their position and stated they were not acting in fresh pursuit but instead were acting as private citizens once they crossed the state line into Kansas. If police officers may claim the rights of private citizens when they cross state lines, then the law of fresh pursuit would not be needed at all. Both the police officers in the 10th Circuit court of Appeals relied upon *State v. Shienle, supra,* for the justification that the Missouri police officers were acting as private citizens. Although the *Shienle* case is clearly factually distinguishable from the case at bay, the Kansas Supreme Court specifically found in *Shienle,* that the police officer there was not acting in such pursuit. The effect of the Court of Appeals opinion is to wipe the law of fresh pursuit from the statute books of the state of Kansas while allowing a party to change their theory on appeal. Police officers should not be permitted to utilize fresh pursuit theory at trial without being held accountable for the entire statute including the provision requiring that they take an arrestee before a magistrate. If foreign police can circumvent the clear intent of a fresh pursuit statute by merely calling in the local police and then claiming to be private citizens the statute has no force of law or applicability whatsoever.

The purpose of the fresh pursuit statute is two fold. First it permits a police officer pursuing a criminal to cross a state line and apprehend a criminal whom prior to the fresh pursuit statute would not have been apprehendable by the pursuing police officer for generally the police officer was no longer an officer when he was outside of his jurisdiction. Second, is to provide police officers with protection against liability for false arrest when acting outside of their jurisdiction.

The hearing provision of the fresh pursuit statute contemplates the pursuing officer returning the arrestees to the jurisdiction once they departed. It guards against the arrestee being spirited out of the state where the arrest is made or being incarcerated therein pending extradition out of the state without a judicial determination as to the lawfullness of the arrest in the first instance.

What the 10th Circuit Court of Appeals has done, as did the trial court and the Missouri police officers, is to strip away Plaintiff's right to have a determination of the lawfullness of their initial arrest by a magistrate of the state of Kansas as required by Kansas law. Therefore, it is repectfully requested that the judgment of the 10th Circuit Court of Appeals be reversed and this matter be remanded to the trial court for a new trial.

RESPECTFULLY SUBMITTED this 8th day of August, 1977

JAMES E. ZIMMERMAN
1616 North Sunset
Tempe, Arizona 85281

CERTIFICATE OF SERVICE

I hereby certify that the original and forty (40) copies of the foregoing Petition for Writ of Certiorari were filed with the office of the United States Supreme Court, Washington, D.C.; and service was made by airmailing three copies of the foregoing to John J. Jurcyk, Jr., 601 Minnesota, 6th Floor, Kansas City, Kansas, 66101, this 8th day of August, 1977.

JAMES E. ZIMMERMAN

Appendix A

United States Court of Appeals
Tenth Circuit
Office of the Clerk
469 United States Courthouse
Denver, Colorado 80202

Howard K. Phillips
Clerk

May 20, 1977

Telephone
303-837-3157

Mr. James L. Eisenbrandt
Attorney at Law
5809 Reeds Road
Mission, Kansas 66202

Re: No. 75-1645, Zimmerman, et al. v. Eber, et al.

Dear Mr. Eisenbrandt:

Enclosed is a copy of an order entered today in the captioned cause.

Very truly yours,
/s/ Howard K. Phillips
HOWARD K. PHILLIPS
Clerk

HKP:cb
Enclosure
cc: Mr. John J. Jurcyk, Jr., McAnany, Van Cleave & Phillips, P.A., 601 Minnesota, Sixth Floor, Kansas City, Kansas 66101

MAY TERM – MAY 20, 1977

Before Honorable Robert J. McWilliams, Circuit Judge, Honorable Jean S. Breitenstein, Senior Judge, and Honorable William E. Doyle, Circuit Judge.

JAMES E. ZIMMERMAN and ELNORA M. ZIMMERMAN,	)	
Plaintiffs-Appellants	)	
vs.	)	No. 75-1645
DAIL EBER AND NICK STIPA,	)	
Defendants-Appellees.	)	

This matter comes on for consideration of appellants petition for rehearing filed May 7, 1977.

Upon consideration whereof, the motion is denied.

/s/Howard K. Phillips
HOWARD K. PHILLIPS
Clerk

Appendix B

NOT FOR ROUTINE PUBLICATION

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

Filed
Apr. 25 1977
Howard K. Phillips
Clerk, United States
Court of Appeals
Tenth Circuit

JAMES E. ZIMMERMAN ELNORA M. ZIMMERMAN,	)	
Appellants,	)	
v.	)	No. 75-1645
DAIL EBER, NICK STIPA,	)	
Appellees.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT
FROM THE DISTRICT OF KANSAS
(D.C. No. KC-3840)

James L. Eisenbrandt for Appellants

Gloria Vusich (John J. Jurcyk, Jr., McAnany, Van Cleaves & Phillips, were with her on the brief) for Appellees.

Before McWILLIAMS, BREITENSTEIN and DOYLE, Circuit Judges.

BREITENSTEIN, Circuit Judge.

This suit for assault, battery, and false arrest was brought in Kansas state court and removed to federal court on diversity grounds. A jury returned a verdict for the defendants and the plaintiffs appealed. We affirm.

Early in the morning of September 20, 1973, defendants Eber and Stipa, Kansas City, Missouri, police officers in separate cars, observed a speeding automobile on a Missouri highway. They gave chase and eventually stopped the car in Kansas. James Zimmerman, the driver of the car, and his wife Elnora were returning to their home in Kansas from an evening spent in Independence, Missouri.

Zimmerman refused to show his driver's license, claiming that the Missouri officers had no authority in Kansas. An altercation ensued. The officers testified that the Zimmermans berated them with obscenities and threatened them with political reprisal. The defendants called for help from the Kansas City, Kansas police and Kansas officers Cheek and Overfelt responded. The Zimmermans were taken to a Kansas City, Kansas police station. Mr. Zimmerman was given a breatholizer and a dexterity test to determine his sobriety. On complaints signed by the Missouri officers, Mr. Zimmerman was charged with driving under the influence of intoxicants and speeding. Mrs. Zimmerman was charged with failing to obey a uniformed officer, disorderly conduct, use of profanity, and assault.

All of the charges were under Kansas law. Both of the Zimmermans were convicted in Kansas City, Kansas municipal court. On appeal the convictions were reversed because of the failure of the officers to bring the Zimmermans before a magistrate as required by Kansas law.

Plaintiffs offered, and without objection the court received in evidence, a copy of the journal entries of the Kansas district court dismissing the charges against the plaintiffs because "the proper steps for procedure following arrest under K.S.A. 22-2404, Section 3, were not followed." That Kansas statute covers arrests in Kansas by an officer from another jurisdiction. Subsection (3) requires that an officer from another state who makes a fresh pursuit arrest "shall without unnecessary delay take the person arrested before a magistrate of the county in which the arrest was made." If the magistrate determines that the arrest was lawful, he is required to commit the person for a reasonable time to await an extradition warrant.

In its jury instructions the court mentioned and explained § 22-2404(3). The defendants objected to that portion of the instructions. During its deliberation the jury sent the following inquiry to the court:

> "Was false arrest (not being brought before a Judge or Magistrate) the responsibility of the Kansas City, Ks. Police department or the two defendants?"

Following consultation with the attorneys for the parties, the court gave supplemental instructions. After stating that if the jury finds that the plaintiffs were arrested by the defendants in Kansas before the arrival of the Kansas officers for violations of Kansas law, the court said:

> "[T]hen, of course, you would determine whether or not these officers had probable cause to believe these people were committing an offense. The responsibility of taking them before a Magistrate, if any existed under the circumstances of this case, as a matter of law, in my opinion, rested with the Kansas City Police Department and not the Defendants."

The plaintiffs urge that the supplemental instruction stated the applicable law incorrectly. Defendants say that plaintiffs did not object. During the discussion which preceded the supplemental instructions, the court expressed an understanding of the plaintiff's position and said that it could be understood that plaintiffs excepted. Although it is unclear what the exceptions were, the point is sufficiently raised to require appellate consideration.

The instruction was proper. The record *supports* a finding that the *defendants arrested plaintiffs before* the arrival of the Kansas officers. K.S.A. § 22-2403 permits an arrest by a private person for any crime "committed by the arrested person in the view of the person making the arrest." In *State v. Shienle, Kan.*, 545 P.2d 1129, the Kansas Supreme Court held that when a *police officer* enters into a foreign state and makes an arrest there for violations of the foreign state's laws, he is making an arrest as a private citizen and is held to the law in that state concerning private citizen arrests. Defendants observed that the speeding occurred both in Missouri and in Kansas. The misconduct of plaintiffs after their car was stopped occurred in Kansas. Plaintiffs were charged with Kansas, not Missouri, violations. In the circumstances the fresh pursuit statute, § 22-2404, was not applicable.

If anyone benefited by the instruction, it was the plaintiffs. They brought the fresh pursuit statute into the case.

Plaintiffs say that defendants may not now assert a citizen's arrest because they did not rely on that theory in the trial court. The unsatisfactory record makes it difficult to be sure on what theory anyone relied in the trial court. The remarks of the trial court show that it was aware of the point. If the record is incorrect or incomplete the fault lies on the plaintiffs-appellants who, under Rule 12 F.R.A.P., have the responsibility of filing the record in the court of appeals.

Plaintiffs urge that the court erred in admitting the results of the breatholizer test on Mr. Zimmerman. Kansas officer Cheek observed, but did not administer the test. He testified from his report which the court received because it was an official record of the Kansas City, Kansas police department. The testimony of Cheek was probably not admissible under *State v. Foster, Kan.*, 422 P.2d 964, 968. The report was made in connection with a criminal investigation and was not admissible under Rule 803 (8), Federal Rules of Evidence.

The error in the admission of the evidence does not justify a new trial. Rule 61, F.R.Civ.P., says that errors in the admission or rejection of evidence do not justify a new trial unless the action is "inconsistent with substantial justice." The breatholizer test was only part of the defense evidence on the state of Mr. Zimmerman's intoxication. The state of his intoxication was a collateral issue separate from the issues of false arrest, assault and battery. The admission of evidence was not so prejudicial as to be inconsistent with substantial justice.

The final argument of the plaintiffs goes to the refusal of the court to permit an amendment to the pre-trial order to allow additional discovery. The case was filed on October 9, 1973. A pre-trial conference was held on June 20, 1974 and discovery was extended to September 30. On November 13, counsel for plaintiffs withdrew and present counsel took his place. The new counsel desired discovery be extended to permit him to take the depositions of the defendants. The court denied his request. Trial was held March 13, 14, 1975. The defendants' version of the incident had been given in the criminal trials. The modification of a pre-trial order rests in the sound discretion of the trial court. See *Monod v. Futura, Inc.*, 10 Cir., 415 F.2d 1170, 1174 and *Globe Cereal Mills v. Scrivener*, 10 Cir., 240 F.2d 330, 335. The court's denial of the modification request was not an abuse of discretion and did not result in manifest injustice.

Affirmed.